In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 40

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

CAPITAL TRANSIT COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

The brief filed by the Capital Transit Company argues (pp. 67–75) that, even if the Court should find that the Interstate Commerce Commission has jurisdiction over the transportation here involved, the Commission's orders are nevertheless invalid because they do not comply with certain technical "statutory limitations and requirements". In particular, it is contended that (1) the Commission lacked statutory authority to enter its order of May 9, 1947, rejecting Capital Transit's notice of revocation of

concurrences in the joint tariffs filed by the Virginia companies; (2) the Commission was not authorized, in its order of July 7, 1948, to fix divisions of the joint fare retroactively to June 22, 1947; and (3) the orders of July 7, 1948, and May 9, 1947, are invalid because they were made effective in less than thirty days after issuance.

As indicated in our main brief, the Government believes that the only substantial issue in this case relates to the jurisdiction of the Commission over the transportation which it has here regulated. The District Court decided only the question of jurisdiction and did not deem it necessary to consider the other objections made to the Commission's orders. Since these objections have been renewed before this Court, however, and since it is believed that they are patently without merit, the Government is filing this reply brief in order that final disposition of the case may not be further delayed.

A similar situation was presented to this Court on the previous appeal, 325 U. S. 357. There, as here, the District Court had passed only on the jurisdictional issue. However, other elements of the Commission's order were attacked and defended on the appeal to this Court. In order to dispose finally of the case without unnecessary delay, the Court considered and decided all questions argued before it, 325 U. S. at 359. It is respectfully submitted that the public interest

justifies a similar disposition of the present appeal.

I

The Commission was plainly authorized by the statute to enter its order of May 9, 1947 (R. 54), rejecting Capital Transit's notice of revocation of its concurrences in the joint tariffs filed by the Virginia companies. The Commission's order of June 22, 1945, established the joint fare of 13⅓ cents for the interstate through route between the District of Columbia and Virginia points. In conformance with that order, the Virginia companies filed tariffs with the Interstate Commerce Commission covering these joint fares. In lieu of filing its own tariff, Capital Transit concurred in the tariffs of the Virginia companies (R. 13–15), adopting these tariffs as its own. These were, in effect, the only tariffs filed with the Commission by Capital Transit covering the joint rate for the through routes to and from the Virginia points.

In filing its notice of revocation effective May 12, 1947 (R. 18), in conjunction with the schedules tendered by the Virginia Lines (R. 49), Capital Transit clearly indicated that it no longer deemed itself bound to maintain a joint fare, but rather that it proposed to establish its separate, independent fare. The necessary effect of revocation would have been to nullify the existing

joint tariff filed pursuant to the Commission's order. By declining to file a new schedule effective upon revocation of the old, Capital Transit impliedly refused to accede to the jurisdiction of the Commission, for it would otherwise be prohibited by the Act from engaging in transportation when it had no tariff on file (Section 217 (d); 49 U. S. C. 317 (d)). The only possible purpose of Capital Transit's revocation of concurrences was to raise its charges for transportation on the through interstate routes to and from the Virginia points, in violation of the Commission's order.

The Act did not require the Commission, in such circumstances, to follow the irregular procedure proposed by Capital Transit. A change in rate, or the dissolution of a joint rate, requires the filing of a tariff (Section 217 (a) and (c), 49 U. S. C. 317 (a) and (c), set forth in the Appendix, *infra*, pp. 12–13). Notice of revocation of concurrences is not equivalent to filing a tariff. In this case, it was merely an attempt to change the joint rate without following the statutory procedure, required by Section 217 (c), of filing a tariff in the form prescribed by Section 217 (a), and the Commission was specifically authorized to reject it. Had the Commission done otherwise, it would have acted contrary to Section 217 (d) by permitting Capital Transit to continue to engage in transportation without having a tariff on file.

Nothing in the Commission's regulations alters, or purports to alter, the statutory directive that no change in rate can be made unless a tariff is on file with the Commission. Rule 15 (d), Section 4, of Tariff Circular MP No. 3 (49 C. F. R. Section 186. 15 (d)), which provides that a carrier may cancel its concurrence in the tariff of another carrier upon 60 days notice to the Commission and all interested parties, merely supplements the statute. The very purpose of the requirement of 60 days notice for revocation is to permit the carrier to submit the new tariff before the statutory period of 30 days notice for tariffs (Section 217 (c)), so that the new tariff may be approved prior to the revocation of the old concurrence. Permission to revoke a concurrence is not permission to operate without a tariff, contrary to the express prohibition of Section 217 (d).

In filing its notice of revocation effective May 12, 1947, Capital Transit was attempting to evade an outstanding order of the Commission, that of June 22, 1945, which in effect was the order sustained by this Court in *United States* v. *Capital Transit Company*, *supra*. It is well settled that an attack upon a Commission order cannot be made collaterally (*Lambert Run Coal Co.* v. *B. & O. R. R. Co.*, 258 U. S. 377; *Venner* v. *Michigan Central R. R. Co.*, 271 U. S. 127; *North Dakota* v. *Chicago & Northwestern Ry. Co.*, 257 U. S. 485; *Illinois Central R. R. Co.* v. *Public Utilities Commission*, 245 U. S. 493),

but only in the manner provided by law, and with the United States a defendant. If changed circumstances or conditions required any modification in the Commission's findings and order, the Commission's Rules of Practice (Rule 101) provide for petitions for rehearing, reargument or reconsideration, which, under Rule 22, are to be served upon all parties, and to which replies are permitted (Rule 23). Such well recognized and orderly procedure was not followed here. If outstanding orders can be defeated by revocation of concurrences, without notice to any party, chaos would result and regulation would be impossible. There are thousands of joint rates in effect throughout the United States and if they can be abrogated in the manner attempted by Capital Transit here, it would be difficult for any shipper or passenger to know what through rate was applicable or what competitors were required to pay, and the same evils which caused Congress to enact the original Act to Regulate Commerce in 1887 would prevail today.

In any event, Capital Transit's attack upon the May 1947 order seems to have only academic importance. The only orders of the Commission which have present practical effect are the order of June 22, 1945, establishing the 13⅓ cent joint fare, and the order of July 7, 1948, modifying that order by raising the fare to 16 cents. The Commission's order of May 9, 1947, whatever

conclusion is drawn as to its validity, has been superseded completely by the July 1948 order.

Capital Transit asserts that the May 9, 1947, order was issued without a full hearing on the need for revision or cancellation of the fare established by the Commission's order of June 11, 1945. But within five months, on October 6, 1947, the Commission reopened the 1945 proceeding for this very purpose, and a full hearing was had, resulting in the order of July 7, 1948. Thus, Capital Transit's objection to the May 9, 1947, order, even if valid, could not detract from the validity of the order of July 7, 1948, which was unquestionably based on a full hearing, including whatever evidence Capital Transit chose to introduce concerning its status during the preceding five-month period. Any procedural defect in the May 1947 order was cured by the subsequent hearing and issuance of the July 1948 order. Certainly there is no basis here for a decree setting aside and permanently enjoining an order which no longer has any practical effect.

II

That portion of the Commission's order of July 7, 1948, requiring Capital Transit to divide the joint fare with the Virginia lines on the basis of 5.83 cents, retroactive to June 22, 1947, is specifically authorized by the statute. Section 216 (f) (49 U. S. C. 316 (f)) (set forth in the

Appendix to our main brief, p. 41) empowers the Commission to issue orders for the retroactive division of rates: "In the case of joint rates prescribed by the Commission, the order as to divisions may be made effective as a part of the original order." The original order was that of June 22, 1945, which was reopened for further proceeding by the order of October 6, 1947 (R. 459). The 5.83 cents division agreed to by the companies had been adhered to consistently by Capital Transit until June 22, 1947. The Commission, which was authorized by Section 216 (f) to make the division retroactive to June 22, 1945, the date of its original order, made it effective to cover only the period since June 22, 1947, the date Capital Transit claimed 10 cents as its share of the joint rate. *Brimstone R. R. Co.* v. *United States,* 276 U. S. 104, struck down a retroactive division of rates where there was no statutory authority for the Commission's action, but the opinion specifically stated that a provision such as Section 216 (f) would authorize retroactive division to the date of the order which originally fixed the joint rate (276 U. S. at 118, 121).

In any event, the question of how the joint fare is to be split between Capital Transit and the Virginia lines has no bearing on the jurisdiction of the Commission to determine the total fare from the District to the Virginia points. "Ordi-

narily, divisions of a particular rate are not of public interest if the rate itself is reasonable." *Brimstone R. R.* v. *United States, supra,* at page 122. Even if that portion of the order of July 1948 which fixed the retroactive division of the fare were invalid, the Commission's authority to determine the 16 cent joint fare would nevertheless remain effective.

III

Capital Transit's objection to the May 9, 1947, and July 7, 1948, orders of the Commission on the ground that they were to take effect in periods of less than 30 days from issuance is completely without substance. The May 1947 order rejecting Capital Transit's notice of revocation was, in effect, a dismissal for failure to follow statutory procedure. Capital Transit could hardly be permitted to claim a right under Section 221 (b) of the Act by virtue of its own failure to follow Section 217. Any other conclusion would compel the Commission to honor a completely unauthorized action for a period of 30 days during which Capital Transit would be subject to no law except its own.

Nor was the July 1948 order (R. 140) limited by the statutory 30-day period. Section 221 (b) (49 U. S. C. 321 (b)), upon which Capital Transit relies, provides that "all orders of the Commis-

sion shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, * * * unless the same shall be suspended or modified or set aside by the Commission * * *". The 1948 order was a modification and amendment of the order of June 22, 1945. It reopened an old proceeding, and did not initiate a new one. Such an amendment is not by Section 221 (b) required to be effective in no less than 30 days. In any case, since the order is of indefinite duration, the four days are severable.

Aside from the failure of Capital Transit to raise this question in its complaint (R. 106–119), the fact that the order was to take effect four days short of the 30-day period in no way prejudiced Capital Transit. The 1948 order was permissive and beneficial, authorizing the carriers to increase the joint fare to 16 cents. If it were void, Capital Transit would have remained subject to the 13⅓ cent rate of the 1945 order. In any event, this objection evaporates in view of the fact that the Commission's order, entered more than fifteen months ago, has not yet become effective,

because of the interlocutory injunction issued by the District Court at the behest of Capital Transit.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

HERBERT A. BERGSON,
Assistant Attorney General.

PHILIP ELMAN,
JOSEPH W. BISHOP, JR.,
RICHARD E. GUGGENHEIM,
Special Assistants to the Attorney General.

DANIEL W. KNOWLTON,
Chief Counsel,

EDWARD M. REIDY,
Associate Chief Counsel,
Interstate Commerce Commission.

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APPENDIX

Section 217 of the Motor Carrier Act (49 Stat. 543, 560, 49 U. S. C. 317) provides:

> (a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.
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> (b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs

in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs: *Provided,* That the provisions of sections 1 (7) and 22 of part I shall apply to common carriers by motor vehicles subject to this part.

(c) No change shall be made in any rate, fare, charge, or classification, or any rule, regulation, or practice affecting such rate, fare, charge, or classification, or the value of the service thereunder, specified in any effective tariff of a common carrier by motor vehicle, except after 30 days' notice of the proposed change filed and posted in accordance with paragraph (a) of this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The Commission may, in its discretion and for good cause shown, allow such change upon notice less than that herein specified or modify the requirements of this section with respect to posting and filing of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

(d) No common carrier by motor vehicle, unless otherwise provided by this part, shall engage in the transportation of passengers or property unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part.

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